

STATE OF NORTH CAROLINA
COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 EDC 01552

<p>█ by and through her parent █ Petitioner,</p> <p>v.</p> <p>Craven County Schools Board of Education, Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
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THIS MATTER is before the undersigned on the parties' cross Motions for Summary Judgment concerning the Petitioner's child's eligibility for services pursuant to the Individuals with Disabilities Education Act ("IDEA").

Procedural History

1. On the date of the Petition, the student █ was an eight year old third grade student attending a private school. She was born prematurely and had suffered a brain hemorrhage, which required a shunt being implanted at the age of eight months, and "revised in an emergency surgery when she was ten months old." Petitioners seek reimbursement for private school tuition, and further evaluation.

2. A Petition for a Contested Case Hearing was filed in the Office of Administrative Hearings on February 10, 2016, alleging, in pertinent part, that Respondent failed to provide █ with a "free appropriate public education" (FAPE); failed to timely and properly evaluate █ improperly determined █ ineligible under IDEA; and failed, procedurally and substantively, to develop and implement an appropriate Individualized Education Program (IEP). Petitioner's requested remedies include: (1) a finding that Respondent violated the procedural and substantive requirements of the IDEA, and denied █ a FAPE; (2) award compensatory special education and related services for the amount of time that FAPE was denied; (3) award private school tuition reimbursement for the 2015-2016 and 2016-2017 school years; (4) order Respondent to pay for independent evaluations of █ (5) award reimbursement for the cost of the private evaluations; and (6) declare that Petitioners are the prevailing party and entitled to attorneys' fees.

3. The *Respondent's Motion for Summary Judgment* was filed July 5, 2016 on the grounds that Petitioner had not and could not produce any evidence to support essential elements of her claims. Respondent argued that Petitioner had not produced evidence (1) to support a determination that █ was an eligible "child with a disability" under IDEA (at 20 U.S.C. § 1414(a)-(c)), and specifically, that Petitioner had not shown that █ needs specially designed instruction;

and, (2) that Petitioner had not given Respondent the prior notice required to receive private school tuition reimbursement.

4. In their Cross-Motion for Summary Judgment, Petitioners argue that, as a matter of law, they are entitled to recover due to procedural violations of IDEA, regardless of [REDACTED]'s need for specially designed instruction.

5. The Respondent's previous Motion for Summary Judgment, filed April 22, 2016, was denied, because there appeared to be "genuine issues of material facts bearing on the disposition of this matter." Subsequently, the undersigned asked the parties to brief the issue of whether relief could be granted based on alleged procedural violations, if the child was ineligible under IDEA. In their present posture, the parties' motions do not raise any genuine issues of material fact bearing on the controversy.

Applicability of Summary Judgment

6. Summary judgment is appropriate when the movant shows "that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). All evidence must be viewed in the light most favorable to the non-moving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). A factual dispute is "material" only if it might affect the outcome of the suit, and "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). "Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E. 2d 660, 664 (2000). While findings of fact are not appropriate at the summary judgment stage because issues of fact may not be resolved, an order may set out the undisputed facts. *In re Estate of Pope*, 192 N.C.App. 321, —, 666 S.E.2d 140, 147 (2008). An administrative law judge may grant summary judgment, pursuant to a motion made in accordance with N.C. Gen. Stat. 1A-1, Rule 56, that disposes of all issues in the contested case. N.C. Gen. Stat. § 150B-34(e).

Undisputed Facts and Arguments

7. Petitioner contends that, "Respondent violated the initial evaluation requirement of the IDEA, by failing to evaluate [REDACTED] for ... eligibility" within 90 days of her mother's request. 34 CFR § 300.301; N.C. Department of Public Instruction Policy NC 1503-4.4(c)(1). Petitioner alleges that, as a direct result of Respondent's delay of over a year performing the evaluation she requested, and failing to notify her of her rights, including the Respondent's obligation to evaluate [REDACTED] at the school's expense, "Petitioner [REDACTED] acted in the only way she knew to help [REDACTED] i.e., at

“great personal expense, she sought her own, privately funded evaluation.” Further, Petitioner contends that this delayed adequate educational services for [REDACTED] because, had Respondent made its “determination that [REDACTED] was ineligible for special education services” when requested by her parent, “Petitioner [REDACTED] could have, and would have, taken affirmative steps to provide additional education support to [REDACTED] (e.g., engaging a private tutor, introducing other support services in the community, or removing [REDACTED] to another school) – before [REDACTED] suffered additional educational harm.” *Petitioner’s Response in Opposition to Respondent’s Motion for Summary Judgment and Petitioner’s Cross-Motion for Summary Judgment*, pgs. 3-5. For the purpose of determining Respondent’s Motion for Summary Judgment, the non-movant Petitioner’s assertions are taken as true.

8. Respondent submitted the July 5, 2016 Affidavit of [REDACTED] the [REDACTED] in Craven County, to support the school’s IEP team’s decision, at an eligibility determination meeting on November 17, 2015, that [REDACTED] was not eligible for special education and related services under the IDEA. Ms. [REDACTED] stated that [REDACTED] was evaluated in all areas of suspected disability, that the IEP Team adequately considered all of the evaluative data, and that the evidence considered by the IEP team showed that [REDACTED] met the definition for the category of [REDACTED], but that [REDACTED] did not demonstrate a need for specialized instruction. *Respondent’s Motion for Summary Judgment* of July 5, 2016, *Exhibit 1*.

The April 19, 2016 affidavit of [REDACTED], [REDACTED]’s second grade teacher during the 2014-2015 school year, describes [REDACTED]’s progress, from just below to high within the grade’s target range for reading comprehension, assisted by the school’s with the “interventions” to furnish [REDACTED] small-group and one-on-one reading for a total of approximately an hour per day. *Respondent’s Motion for Summary Judgment* of April 22, 2016, Attachment 1.

The August 12, 2016 affidavit of [REDACTED] for Craven County Schools, interpreted the results of the private evaluation arranged by Petitioner, and conducted on March 9, 2015 by psychologist [REDACTED]. On October 29, 2015, Ms. [REDACTED] also performed a neuropsychological evaluation of [REDACTED] and “some additional educational testing that had not been conducted by [REDACTED]. She found Mr. [REDACTED] evaluation to be generally consistent with the results of her neuro-psychological evaluation and educational testing, and supportive of the IEP team’s determination. She also reviewed information provided to Petitioner by [REDACTED]’s teacher at [REDACTED], and felt that it supported the conclusion “that [REDACTED] did not need specialized instruction.” *Respondent’s Motion for Summary Judgment* of July 5, 2016, Exhibit F.

Petitioner did not present affidavits pursuant to Rule 56(e) controverting these contentions. For the purpose of determining Petitioner’s *Cross-Motion for Summary Judgment*, the non-movant Respondent’s assertions are taken as true.

9. Respondent’s IEP team utilized the psychological evaluation prepared by Mr. [REDACTED] and relied on it in lieu of obtaining a separate, duplicating assessment.

Conclusions of Law

10. To be entitled to the “free appropriate public education” (FAPE) provided by the Individuals with Disabilities Education Act (IDEA), a child must be found to be a “child with a disability,” within the meaning of the IDEA, “*who, by reason thereof, needs special education and related services.*” 20 U.S.C. § 1401(3)(A); 34 C.F.R. 300.8(a)(1); 34 C.F.R. § 300.300. FAPE means special education and related services that are provided in conformity with an individualized education program (IEP), as required by 20 U.S.C. § 1414(d). An “eligibility determination” – “that a child has a disability and needs special education and related services” -- is “the lynchpin from which all other rights under the statute flow.” *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 (9th Cir. 2007).

11. A student who is not entitled to a FAPE cannot show a denial of FAPE. An IDEA remedy cannot be granted to an ineligible student, on either substantive or procedural grounds, as both must rest on a determination that FAPE was denied. “[T]he fact that a child may have a qualifying disability does not necessarily make him ‘a child with a disability’ eligible for special education services under the IDEA. The child must also need special education and related services.” *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 237 Ed Law Rep 324 (D. Conn., 2008), *aff’d sub nom. A.P. v. Woodstock Bd. of Educ.*, 370 F. App’x 202 (2d Cir. 2010).

12. The undersigned is not precluded from vacating the previous order denying Respondent’s Motion for Summary Judgment. “An order denying summary judgment is not res judicata and a judge is clearly within his rights in vacating such denial.” *Miller v. Miller*, 34 N.C. App. 209, 212, 237 S.E.2d 552, 555 (1977). *See also, State v. Custard*, No. 06 CVS 4622, 2010 WL 1035809, at *39 (N.C. Super. Mar. 19, 2010) (unpublished) (“A judge is clearly within his rights in vacating his own summary judgment order, for [s]uch procedure does not involve one judge overruling another.”) (quotation marks omitted).

13. The parent of a child with a disability has the right to obtain an independent educational evaluation of the child at public expense, and the agency should ensure that such is provided at no cost to the parent. The agency may not impose conditions or timelines that, in practice, frustrate that goal. 34 C.F.R. § 300.502.

Consequently, it is **ORDERED**:

That Respondent shall pay [REDACTED], or refund to the Petitioner, the reasonable value of his services;

That the undersigned **VACATES** the Order denying Respondent’s Motion for Summary Judgment entered August 3, 2016;

That the Respondent Motion for Summary is **GRANTED**;

That the Petitioners’ Cross-Motion for Summary Judgment is **DENIED**; and,

That the Petition therefore must be, and hereby is **DISMISSED**.

NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED.

This the 15th day of September, 2016.



J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 15th day of September, 2016.



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